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WESTERN AFRICAN TALKS ON CETACEANS AND THEIR HABITATS Adeje, Tenerife, Spain, 16-20 October 2007

> **Options for International Cooperation** on Cetaceans and Sirenians Conservation in the African Eastern Atlantic Basin under CMS

> > (Note by the CMS Secretariat)

#### Overview

CMS Conference of the Parties Resolution 7.7 (Bonn, 2002) supported the development of an appropriate CMS instrument on small cetaceans and sirenians in West Africa, and the allocation of sufficient resources to this purpose. Support for the development of such an instrument was reiterated by CMS Resolution 8.5 (Nairobi, 2005), which also called upon Parties to the Convention and other interested States and organisations to provide financial and in-kind support to this effort.

Recommendation 7.3, Regional Coordination for Small Cetaceans and Sirenians of Central and West Africa, focused on regionally specific threats and issues including the destruction or modification of habitats by the development of coastal areas and of the riverbanks of inland waters, pollution, agriculture, increasing mortality and by-catch which could, if not properly managed, lead to further decline in small cetacean and sirenian populations. The Recommendation encourages all Parties in the distribution range to consider the establishment of a memorandum of understanding on these species and the implementation of collaborative actions, notably through action plans, which would consider the particular characteristics of inland and marine waters.

Thanks to the generous support of several donors, it has been possible for the CMS Secretariat to convene a first negotiation meeting among the range states (Adeje, Tenerife, Spain, 18-20 October 2007), which includes among its aims to determine the scope and format of a possible CMS instrument for the Conservation of the West African Manatee and Cetaceans of the Eastern Atlantic Basin.

Key questions identified for the consideration of the meeting include

- Most effective taxonomic coverage;
- Geographic coverage;
- Legal and institutional options for the development of a new instrument or other forms of cooperation under CMS.

While the above-mentioned COP Resolutions and Recommendations provide already some indications concerning the above mentioned issues, in defining the scope of this agenda item of the meeting it was decided to allow the exploration of a broader set of options. This, inter alia, allows range states which might not have participated in the 7th and 8th meetings of the COP to participate fully in the definition of the scope of the instrument.

#### Taxonomic coverage

Resolutions 7.7 and 8.5 and Recommendation 7.3 identify the taxonomic scope of the CMS instrument as covering small cetaceans and sirenians. Within CMS, the term 'small cetaceans' has been consistently used to indicate all species of cetaceans belonging to the suborder ODONTOCETI, with the exception of the sperm whale *Physeter macrocephalus*. As regards the sirenians, the only species present in the geographic area under consideration is the West African Manatee *Trichechus senegalensis*. The representatives of the Range States might wish to confirm the taxonomic coverage of the future CMS instrument as defined by the above mentioned resolutions and recommendations.

At this early stage of negotiation, the option could however be considered of extending the taxonomic scope of the instrument to cover all cetaceans. Within CMS, a precedent to such an extension of the originally envisaged taxonomic scope for a CMS instrument in the course of its development can be found in the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS). The Agreement was initially expected to cover small cetaceans, but its scope was extended in the course of the negotiations to cover all cetaceans present in the Agreement Area. Another CMS

instrument concerning cetaceans, the Memorandum of Understanding for the conservation of Cetaceans and their Habitats in the Pacific Islands Region concluded in September 2006, covers all cetaceans, although in this case the taxonomic coverage was envisaged as such from the outset.

The main advantage of this option would seem to be the possibility of covering under a single international instrument related species, the conservation of which is likely to be covered at a national level by the same legal and regulatory instruments, and to be under the responsibility of the same government department and/or administration in most range states. However, conservation issues concerning large whale populations in the African Eastern Atlantic Basin seem to be quite distinct from those identified for small cetaceans. Baseline scientific information is still incomplete, however such issues might require to be addressed at a geographic scale different from the one envisaged for the instrument under consideration. An inclusion of large whales might distract the attention from urgent conservation priorities specific to small cetacean populations and possibly significantly delay the conclusion of the instrument.

An interim solution would be to limit at this stage the taxonomic scope of the instrument to small cetaceans and the West African manatee, while maintaining the possibility of a future extension once the instrument will have become operational.

#### Geographic coverage

Resolutions 7.7 and 8.5 and Recommendation 7.3 do no provide a precise definition of the geographic scope of the new CMS instrument.

It appears however implicit in Rec. 7.3 that the scope should include the entire present distribution range of the West African manatee. In terms of range states, this should include all Atlantic riparian states between Mauritania (northern limit) and Angola (southern limit) and a few African landlocked countries including Burkina Faso, Chad, Niger and Mali.

With respect to small cetaceans, the situation appears to be considerably more complex, in consideration of the number of species involved and their distribution. Perrin and Van Waerebeek have undertaken, for the purpose of the present meeting, an analysis of the diversity and distribution of small cetacean species in an area covering the entire Atlantic coast of Africa from Morocco to South Africa and the archipelagos of Macaronesia (Canary Islands, Madeira, Azores and Cape Verde Islands). The analysis has identified 32 species of small cetaceans recorded for the area, and their distribution by country/archipelago. Without entering into the details of the analysis, which are provided in a separate document for the consideration of the meeting, it would seem in general that no precise boundaries or limits can be identified within the considered area in terms of small cetacean fauna. Some discontinuities seem however to exist, the most evident being located between Angola and Namibia. This discontinuity appears to be related to the influence of the Benguela current and allows differentiating a southern area characterised by temperate species from a northern area characterised by tropical species.

For the purpose of this first negotiation meeting, the potential geographic scope of the CMS instrument has been set to include the entire Atlantic coast of Africa, the archipelagos of Macaronesia (Canary Islands, Madeira, Azores and Cape Verde Islands) and a few mid-Atlantic islands (Ascension Island, St. Helena). The meeting is expected to discuss and provide indication on whether, with a view to further negotiations, this scope should be limited on the basis of biogeographic or other considerations.

In terms of territorial coverage, it is assumed that the instrument should cover the maritime areas under the jurisdiction of the range states, as well as inland waters recognized as actual

or potential habitat for the West African Manatee. It should be noted however that CMS instruments can be set to include also international waters, it being understood that the provisions of the instrument would apply in international waters only to the range states participating in the instrument.

## Legal and Institutional Options

This note undertakes an analysis of the strengths, weaknesses, opportunities and threats (SWOT analysis) of the following legal and institutional options that could be considered by the Adeje meeting:

- a) A partnership arrangement with action plan;
- b) An MoU with action plan;
- c) A legally binding treaty with action plan.

The results of the analysis are presented in a tabular format in Table 1. Any of these arrangements could be used as a basis for international cooperation under CMS. If appropriate it could be envisioned to start with a simpler instrument and upgrade its legal standing over time.

## General Advantages and Disadvantages of Cooperative Activities through CMS

Action under CMS has a number of distinctive features and advantages compared with those possible through other Multilateral Environmental Agreements (MEAs). In general, CMS may:

- a) Focus attention on a discrete set of migratory species within any given geographic area;
- b) Specify and engage the Range States most appropriate for these species;
- c) More easily facilitate joint action including harmonisation of existing legislation and policies, information exchange and integration, and best practice development across the geographical area of the instrument, whether through a formal, binding Agreement, an MoU, or a partnership arrangement; and
- d) Provide the possibility for better access to other types of assistance, including from within the CMS Family, other biodiversity-related conventions and international organisations, and integration into the entire world of environment and development.

However, there are also possible qualifying factors that need to be considered, including:

- a) The additional administrative and financial burden for some national level implementing agencies, even when actions are closely correlated with obligations under other MEAs;
- b) The considerable time likely to be needed to negotiate and conclude a new arrangement, and the potentially significant resources needed to set-up the institutional machinery to support and monitor implementation on a sustainable basis; and
- c) Continued reliance on national conservation priorities.

## Financial Implication of Options under CMS

Leaving out the cost of the negotiation process, the financial implications of each option are dependent on the costs to (1) establish a secretariat or coordination mechanism, (2) service the instrument including regular meetings to monitor and evaluate implementation, and (3) costs for activities to support implementation (mostly likely internationally-oriented cooperative activities rather than individual activities within a Range State).

In its estimates, the Secretariat has set the following assumptions and parameters:

- (i) All estimates are for a 3 year period.
- (ii) Options A and B are treated alike for estimating purposes.
- (iii) For each main option (i.e. A/B and C) sub-options are provided for two different staffing models (a) full UN staffing and (b) non-UN staffing with UN supervision at three different locations (CMS Secretariat's headquarters, European range state, Western African range state). There are thus 12 different cost options (A/B 1-6 and C 1-6).
- (iv) The costs of non-UN staff are assumed to be the same as UN staff but without "post adjustment", which lowers costs considerably. However in full market conditions the savings could be greater than the estimates given.
- (v) The costs options for full UN staffing in Bonn assume free office accommodation on the same terms as the current CMS and Agreements staff located there. Other cost options include accommodation estimates.
- (vi) A tentative estimate is provided for the cost of activities, in the absence at the present stage of sufficiently reliable parameters (e.g. action/conservation plan; identification of priority conservation action). It is however assumed that costs of activities should be the same for the various legal and institutional options under CMS, and should therefore be neutral in the differentiation of the total cost of the various options.

Final costs for an option would also depend on such factors as the number of meetings scheduled to service the arrangement, the location of the meetings, how many countries would be funded to attend and the number of activities that would be funded.

A significant consideration would be the extent to which the participating Range States would be obliged to contribute to the arrangement's maintenance and the extent to which CMS's regular budget would contribute to the overall budget, especially during the time before there is significant or universal membership in the arrangement. Assessed contributions pursuant to a legally binding arrangement would seem the surest way to assure financial and, therefore, institutional stability.

A dedicated budget line within the CMS regular budget to underwrite some, or all, regular meetings of the signatories of a partnership arrangement or MoU - a practice that ended for MoUs with the Eighth Meeting of the CMS Conference of the Parties – would also contribute to ensuring institutional stability<sup>1</sup>. An option could also be envisioned where the Convention's contribution gets phased out within a specified period of time, giving the members of an arrangement time to mobilise resources.

Both sources of funds could be supplemented by voluntary contributions.

<sup>&</sup>lt;sup>1</sup> CMS COP Resolution 8.5 encouraged Parties, non-Parties and organisations to work closely with the CMS Secretariat in the triennium and to generously contribute financially and in-kind resources beyond whatever funds may be provided in the core CMS budget to support coordination mechanism for instruments such as MoUs. The Eighth Meeting of the Conference of the Parties adopted the CMS budget for the triennium 2006-2008 with a very modest amount dedicated to Agreement development and servicing under budget line 2260. This is in contrast to past CMS budgets. However, the present triennium's budget was agreed on the understanding that voluntary contributions would be provided to help support the implementation of the Convention in lieu of larger assessed contributions on the Parties.

# **Action Requested:**

The Range States are invited to:

- Consider the three legal and institutional options for international cooperation under CMS to conserve cetaceans and sirenians in the African Eastern Atlantic Basin, as well as the options concerning its taxonomic and geographic scope; and
- Chose options for subsequent elaboration.

Table 1. Strengths, Weaknesses, Opportunities and Threats (SWOT) of potential CMS instruments or partnership arrangements for cetaceans and sirenians in the African Eastern Atlantic Basin

(adapted from Goriup and Tucker 2005 and IUCN Shark Specialist Group 2007)

Type of CMS Instrument	Main Characteristics	Strengths	Weaknesses	Opportunities	Threats
1. Partnership Arrangement	<ul> <li>An informal voluntary framework, potentially defined by a written partnership agreement, to promote dialogue, cooperation and collaboration between a range of stakeholders, from all levels of government to non- governmental organisations, industry, community groups and local people.</li> <li>Ideally associated with an action plan and would act as the institutional umbrella to support action plan implementation.</li> <li>Requires a secretariat for effective functioning.</li> <li>The species covered do not necessarily have to all be listed in Appendix II of CMS.</li> </ul>	<ul> <li>Interpreted to meet the key requirements for a regional cooperative framework under Article IV of the Convention and CMS COP Res 2.6.</li> <li>If affiliated with CMS it would enjoy the international legitimacy of CMS along with the benefits derived from the Convention's close partnership with UNEP.</li> <li>Membership not restricted.</li> <li>Partners are not confined to governments, but can include inter-governmental organisations, non-governmental and private sector entities.</li> <li>Depending on taxonomic and geographic scale of the undertaking could be developed relatively quickly with little or no post-adoption procedures at national level (no need for signatures by the participating agencies or States) in most countries.</li> </ul>	<ul> <li>Not legally binding and therefore depends for effectiveness entirely on the goodwill of the partners, and the willingness of partners to establish national partnership networks, and to support and provide resources to a secretariat.</li> <li>Might be ineffective if established without a secretariat to support and coordinate operations or an accompanying action plan.</li> <li>Untested mechanism within CMS. (Note however that MoUs are essentially partnership agreements between Range States and a limited number of collaborating organisations (see below)).</li> </ul>	<ul> <li>Relatively quick and simple to negotiate and establish and therefore potentially expedient. Any relevant potential partners may become engaged in the process.</li> <li>The partnership could serve as a bridge to a more formal arrangement, potentially including a new CMS MoU or a formal Agreement.</li> </ul>	<ul> <li>Partners do not provide financial or in-kind contributions to support the partnership's operations and implementation because it is not legally binding.</li> <li>Ad hoc voluntary financial contributions are probably not sustainable over the longer term.</li> <li>The CMS COP may not provide the CMS Secretariat with the additional financial and/or manpower resources needed to coordinate the partnership.</li> <li>Range State partners will not give sufficient attention to implementation at national level because it is not legally binding.</li> </ul>

Type of CMS Instrument	Main Characteristics	Strengths	Weaknesses	Opportunities	Threats
2. Memorandum of Understanding (under Article IV(4) and CMS COP Res. 2.6)	<ul> <li>A non-binding legal and institutional framework for the delivery of one or more action plans.</li> <li>Has been used most typically within CMS to co-ordinate short-term conservation measures across the range of one or more seriously threatened migratory species/populations.</li> <li>Operates until conservation status improves, or a more elaborate instrument (i.e. a formal Agreement (see below) under Article IV(3) or IV(4)) is prepared, adopted by Range States and enters into force.</li> <li>The species covered do not necessarily have to all be listed in Appendix II of CMS.</li> </ul>	<ul> <li>Depending upon the taxonomic and geographic scale can be developed and concluded on relatively short notice.</li> <li>Geographical coverage does not need to extend to the entire migratory range of the species concerned.</li> <li>Enjoys the international legitimacy of CMS along with the benefits derived from the Convention's close partnership with UNEP (e.g. funding from major donors such as GEF).</li> <li>If sustainably resourced, has the potential to provide a stable legal and/or political framework for initial implementation and later evolution.</li> <li>Implementation kept under regular review.</li> <li>Signatories should regularly report on implementation.</li> <li>CMS acts as secretariat and depositary and coordinates it with the possibility to outsource.</li> <li>Their simplicity allows MoUs (and/or their integral comprehensive action plans) to be fairly easily re-opened for re-negotiation or amendment.</li> </ul>	<ul> <li>Not legally binding and therefore depends for effectiveness entirely on the goodwill of the participating signatories.</li> <li>No formal organisational structure created for implementation.</li> <li>Typically has a much less substantive content than a formal Agreement because it must not create any new commitment for the signatory Range States however the integral action plan is comprehensive and tailored to the particular species' needs.</li> <li>As an MoU does not create any institutional structure of its own, it arguably may not be as dynamically implemented as an Agreement with the daily engagement of a secretariat, unless the CMS Secretariat has dedicated capacity or a coordination mechanism is created (see IOSEA).</li> <li>Historically, no regular financial contributions are assessed on MoU Signatories, though voluntary contributions are encouraged.</li> </ul>	<ul> <li>Participation in the MoU by range states is simplified, requires signature but do not normally requires parliamentary rarification.</li> <li>International collaborating organisations may sign the MoU demonstrating their commitment to support its implementation.</li> <li>The MoU could focus on the most threatened species and key Range States in order to minimise delays and costs and direct conservation action to where it is most needed.</li> <li>The MoU could serve as a forerunner for a new formal Agreement either focusing on the species originally addressed or a larger group.</li> </ul>	<ul> <li>Signatories do not provide financial or in-kind contributions to support the MoU's operations and implementation because MoU is not legally binding.</li> <li>CMS COP may not provide the CMS Secretariat with the additional financial and/or manpower resources needed to coordinate the MoU and Action Plan and hold regular meetings of the signatories to monitor implementation.</li> <li>Ad hoc voluntary financial contributions are probably not sustainable over the longer term.</li> <li>Signatories to the MoU will not give sufficient attention to implementation at national level because it is not legally binding.</li> </ul>

Type of CMS Instrument	Main Characteristics	Strengths	Weaknesses	Opportunities	Threats
3. Agreement (under Article IV)	<ul> <li>A legally binding multilateral treaty pursuant to CMS Articles IV (3) or IV (4).</li> <li>May be concluded for species listed on Appendix II (Article IV (3)) or any population of any species or lower taxon of wild animals, members of which periodically cross one or more national boundaries (Article IV (4)).</li> <li>While initially developed for species listed on CMS Appendices, Article IV (3) Agreements may later be expanded to cover additional species (see for example EUROBATS).</li> </ul>	<ul> <li>A self-standing treaty with its own institutional machinery and budget for supporting and monitoring the implementation of the instrument and its integral action plan.</li> <li>The legally binding nature of this instrument could unlock resources that would not be released for a MoU.</li> <li>Decision making, policy making and advisory bodies, serviced by a dedicated secretariat, meet on a regular basis.</li> <li>Implementation kept under regular review by dedicated secretariat.</li> <li>Parties must make regular reports on implementation.</li> <li>Has the potential to create a dynamic environment to address the particular needs of the species covered, and Range States.</li> <li>Provides long term legal stability for the Range States, their authorities and scientific bodies, as well as the international community of governmental and non- governmental organisations involved.</li> <li>Has flexibility in coverage of species and geographic range, and can develop organically from a MoU.</li> <li>Agreement budget based on an agreed scale of assessment.</li> </ul>	<ul> <li>Potentially long and costly negotiation process.</li> <li>Formal negotiation session needs to be organised to adopt final text.</li> <li>Needs to be ratified in accordance with the internal law or decision making procedures of every Range State. This can take considerable time.</li> <li>Entry into effect could take many years.</li> <li>Membership limited to States, though the forum created by the Agreement could be open to observers.</li> <li>The legal and institutional framework of an Agreement means the Parties may have to stretch limited resources to a further MEA requiring regular contributions and national personnel for meetings, reporting and implementation.</li> </ul>	<ul> <li>Any Range State willing to become a Party could do so provided it ratifies the Agreement.</li> <li>An Agreement could provide the most comprehensive, stable legal and institutional framework for the significant number of Range States involved (ca. 30) and species involved (&gt; 20).</li> </ul>	<ul> <li>Agreement Parties might not contribute sufficient resources to make it effective as an independent instrument.</li> <li>Need a critical mass of countries to provide sufficient financial resources to support institutions created.</li> <li>Parties do not give sufficient attention to implementation at national level because of lack of resources regardless of instrument's legal nature.</li> </ul>

Table 2.a: ESTIMATED GENERAL COSTS (EURO)       - OPTIONS A & B -         OPTION A: PARTNERSHIP ARRANGEMENT & ACTION PLAN - OPTION B: MEMORANDUM OF UNDERSTANDING & ACTION PLAN								
Sub-options	Full UN Staffing [6]			Non-UN Staffing [7]				
Locations/Cost options	CMS SECRET.	RANGE STATE EUROPE	RANGE STATE W.AFRICA	CMS SECRET.	RANGE STATE EUROPE	RANGE STATE W.AFRICA		
BUDGET COMPONENTS (In Euros)								
1. Secretariat/Coordination mechanism[1]	501 241	504 753	367 006	424 246	413 917	216 180		
2. Servicing[2]	178 000	178 000	178 000	178 000	178 000	178 000		
3. Activities[3]	300 000	300 000	300 000	300 000	300 000	300 000		
SUB-TOTAL (EURO)	979 241	982 753	845 006	902 246	891 917	694 180		
4. Office incidentals/overheads[4]	21 697	49 138	42 250	17 847	44 596	34 709		
SUB-TOTAL (EURO)	1 000 938	1 031 891	887 256	920 093	936 513	728 889		
5. "Standard UNEP" overheads charge[5]	130 122	134 146	115 343					
TOTAL (EURO)	1 131 060	1 166 037	1 002 599	920 093	936 513	728 889		
Savings (Euro)	0%	3%	-11%	-19%	-17%	-36%		
In comparison to Bonn duty station (international officer)								

[1] Outsourcing secretariat/coordination functions to a non-UN entity may result in savings. Estimated costs for outsourced support will depend on location and could range from 15% to 28% over the 3-year-budget for a full time coordinator and 1 Assistant.

[2] Assumes: 2 standalone meetings at € 89,000/meeting (final costs depend on location and number of subsidized participants). Savings could be achieved if regular meetings were held in the margins of other meetings.

[3] In the absence at this stage of a work plan or a conservation plan against which making cost estimates, a lumpsum amount is estimated for implementation activities. It is however assumed that implementation cost should be the same for all the considered option and should therefore have a neutral effect in the comparison of the various options.

[4] Assumes: 5 percent of programme costs and includes office, supplies and travel. The CMS Secretariat option, by presenting free office accommodation, offers significant saving over 3 years.

[5] Assumes: 13 percent of total costs.

[6] Secretariat's Coordination by international officer & assistant, in addition to CMS oversight reflected in (i) agreement officer (3% time), (ii) CMS assistant (5%) and (iii) CMS senior officer (2%).

[7] Secretariat's Coordination by national officer & assistant, in addition to CMS oversight reflected in (i) agreement officer (5% time), (ii) CMS assistant (2%) and (iii) CMS senior officer (2%).

Table 2.b: ESTIMATED GENERAL COSTS (EURO)       - OPTION C: AGREEMENT -									
Sub-options	Full UN Staffing [6]			Non-UN Staffing [7]					
Locations/Cost options	CMS SECRET.	RANGE STATE EUROPE	RANGE STATE W.AFRICA	CMS SECRET. [8]	RANGE STATE EUROPE [9]	RANGE STATE W.AFRICA			
BUDGET COMPONENTS (In Euros)									
1. Secretariat/Coordination mechanism[1]	535 004	538 913	398 830	451 358	445 389	249 090			
2. Servicing[2]	178 000	178 000	178 000	178 000	178 000	178 000			
3. Activities[3]	300 000	300 000	300 000	300 000	300 000	300 000			
SUB-TOTAL (EURO)	1 013 004	1 016 913	876 830	929 358	923 389	727 090			
4. Office incidentals/overheads[4]	23 385	50 846	43 842	19 203	46 169	36 355			
SUB-TOTAL (EURO)	1 036 389	1 067 759	920 672	948 561	969 558	763 445			
5. "Standard UNEP" overheads charge[5]	134 731	138 809	119 687						
TOTAL (EURO)	1 171 120	1 206 568	1 040 359	948 561	969 558	763 445			
Savings (Euro)	0%	+3%	-11%	-19%	-17%	-35%			
In comparison to Bonn duty station (international officer)									

[1] Outsourcing secretariat/coordination functions to a non-UN entity may result in savings. Estimated costs for outsourced support will depend on location and could range from 15% to 27% over the 3-year-budget for a full time coordinator and 1 Assistant.

[2] Assumes: 2 standalone meetings at € 89,000/meeting (final costs depend on location and number of subsidised participants). Savings could be achieved if regular meetings were held in the margins of other meetings.

[3] In the absence at this stage of a work plan or a conservation plan against which making cost estimates, a lumpsum amount is estimated for implementation activities. It is however assumed that implementation cost should be the same for all the considered option and should therefore have a neutral effect in the comparison of the various options.

[4] Assumes: 5 percent of programme costs and includes office, supplies and travel. The CMS Secretariat option, by presenting free office accommodation, offers significant saving over 3 years.

[5] Assumes: 13 percent of total costs.

[6] Secretariat's Coordination by international officer & assistant, in addition to CMS oversight reflected in (i) agreement officer (2% time), (ii) CMS assistant (3%) and (iii) CMS senior officer (1%).

[7] Secretariat's Coordination by national officer & assistant, in addition to CMS oversight reflected in (i) agreement officer (3% time), (ii) CMS assistant (2%) and (iii) CMS senior officer (2%).

[8] Salary of "national senior programme officer" in Europe assumed equivalent to 15% majored salary of "national programme officer" at this duty station (by analogy to international posts)

[9] Salary of "national senior programme officer" in European Range State assumed equivalent to 15% majored salary of "national programme officer" at this duty station (by analogy to international posts)